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Utah Supreme Court

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**IN THE SUPREME COURT
of the
STATE OF UTAH**

KENNECOTT COPPER CORPORATION, a corporation,
Plaintiff and Appellant,

VS.

SALT LAKE COUNTY, a political
subdivision of the State of Utah,
Defendant and Respondent,

STATE TAX COMMISSION OF
UTAH,
Intervenor and Respondent.

BRIEF OF APPELLANT

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IN THE SUPREME COURT
of the
STATE OF UTAH

KENNECOTT COPPER CORPORATION, a corporation,

Plaintiff and Appellant,

vs.

SALT LAKE COUNTY, a political
subdivision of the State of Utah,

Defendant and Respondent,

STATE TAX COMMISSION OF
UTAH,

Intervenor and Respondent.

Case No.
7639

BRIEF OF APPELLANT

Section 80-5-1 of the Utah Code as amended provides
that:

“ * * * all taxable property must be assessed
at 40% of its reasonable, fair cash value. Land
and the improvements thereon must be separately
assessed.”

Section 80-3-1(5) provides:

“ ‘Value’ and ‘full cash value’ mean the
amount at which the property would be taken
in payment of a just debt due from a solvent
debtor.”

This appeal involves the question of whether these words mean what they seem to appellant clearly to say; or if they are to be so construed that the taxing authorities can arbitrarily assign any figure as the value of specific property for tax purposes within the range from market value to an "astronomical figure" based upon the particular owner's earnings and his need for and use of that specific property in connection with his business operations.

I.

STATEMENT OF FACTS

Two tracts of real property—both exclusive of any surface improvements and mineral content—are here involved: the Kennecott tailings pond, and its millsite lands in Salt Lake County, Utah. The following facts are quoted from the stipulated findings (R. 2-10):

"4(a). Plaintiff's mining operation in the State of Utah is a vast and continuous operation beginning with what is commonly known as the Utah Copper Mine, one of the largest open-pit mines in the world. The ore is low grade, and large scale operations are essential to the profitable mining thereof. The pit is terraced with benches or levels varying in elevation from 50 to 85 feet and in width from 65 to 300 feet, with a perimeter of approximately 5 miles and a maximum depth of approximately 1800 feet.

"(b) The pit is reached by standard gauge railroad on the surface and by tunnel; the area of operations in Bingham Canyon is nearly 3000 acres, which includes the open pit and about 150 miles of standard gauge railroad tracks therein

and in surface and subterranean connections between the pit and the reduction works owned by plaintiff at Magna and Arthur, Utah, about 13 miles distant. Plaintiff is the owner of more than 25,000 acres of land in Bingham Canyon and at and in the vicinity of the reduction works at Arthur and Magna.

“5(a) The crude ores as mined by plaintiff and hauled from the mine at Bingham to mills at Magna and Arthur for concentration, contain a great quantity of waste material. In the course of the concentration process, less than three per cent by weight of the crude ores mined is removed in the form of concentrates. The concentrates contain the values and are saved, smelted and refined and thus converted into a commercial product. One ton of concentrates is obtained from thirty-six tons of crude ores, and the remaining thirty-five tons, being the refuse material or tailings, are flowed out over and deposited in a tailings dump.

“(b) In the course of the concentration of the crude ores from plaintiff’s said mine and the ores mined therefrom by plaintiff’s predecessors in interest, the discarded refuse material has been deposited year after year over the period of approximately forty-one years last past, in the vicinity of plaintiff’s Magna and Arthur concentrating mills in said dump of tailings over an area of 6258.93 acres more particularly described in the complaint and in evidence before the court.

“(c) The tailings for one year have been placed on the tailings of previous years, creating a dump at present of approximately 481,000,000 tons of tailings spread over this area of 6258.93 acres at an average depth of 36 feet. The tailings are of fine content, require constant treatment to prevent dust storms, and will not support or sustain any growth. Before use as a tailings dump

this area was swampy pasture land used for grazing and pasturing and similar to land presently surrounding and adjacent to the dump area. The dump area has now lost all value for such uses, which have been destroyed.

“(d) The crude ores have varied somewhat in their copper content, but over the past twenty-five years the average copper contained therein has been approximately one per cent of their weight. In the course of the concentration or reduction process in the mills at Magna and Arthur over the past fifteen years the average percentage of recovery has been approximately ninety per cent. Thus the tailings contain approximately one-tenth of one per cent copper. These tailings are a permanent deposit upon this area, which has become and long has been a tailings dump and nothing else. Under any present methods the tailings will never be worth removing and will never be removed.

“(e) These tailings are worthless except in this, that over the past several years plaintiff has recovered from the water draining from the tailings dump, copper in the form of copper precipitates and thus the small quantity of copper remaining in the tailings after the reduction process has been completed is being slowly drained out of the tailings dump. In the year 1939—179,543 pounds of copper was obtained from this source; in the year 1940—1,224,567 pounds; in the year 1941—595,575 pounds; in the year 1942—412,241 pounds; in the year 1943—478,390 pounds; in the year 1944—741,925 pounds; in the year 1945—348,254 pounds; and in the year 1946—148,101 pounds; and the year 1947—401,073 pounds of copper were so produced. As is and has been well known, and understood by the taxing authorities of the State of Utah, the copper so recovered has been included

in the total production figures annually reported to the State Tax Commission by this taxpayer, is reflected in net proceeds for the purpose of the mine assessment at two times their value, and as well in the gross proceeds of the mine upon which the mining occupation tax is and has been assessed each year.

“(f) In order to retain the 481,000,000 tons of mine tailings in the 6258.93 acre dump, plaintiff and its predecessors have been required over the many years to expend hundreds of thousands of dollars to construct the dike which is in place on the outside perimeter thereof. The total so expended far exceeds the tax values of said dump as assessed by defendant to which objection is made by plaintiff. This dike generally tapers from about an 85-foot base to a 20-foot top, and is composed of rock, gravel and solid earth in contrast to the fine tailings. In the initial stages of the deposit of the mine tailings on the old lake lands, no such dike was required. The necessity for the dike came into existence as additional tailings were piled upon tailings first deposited upon the swamp land. This process has continued until the average depth of the dike and tailings at the time of the assessment was about 36 feet.

“(g) Plaintiff must continue to enlarge the dike from time to time at a cost of further thousands of dollars per year in order to continue to contain the mine tailings, as additional tailings are continually added to the top of the dump. Except for any unused portion, i.e., remaining capacity for additional tailings, the dike serves no purpose except to retain and prevent the tailings already deposited on the dump from flowing down and away from the dump, and thus trespassing upon other adjacent real property.

“(h) The dump requires continuous, con-

stant attention, care and expense in order to avoid becoming a nuisance. The tailings must be kept moist. Litigation involving some three hundred plaintiffs and a damage claim of three million dollars has heretofore involved plaintiff with respect to this dump. During 1950 approximately \$200,000.00 will be spent in connection with this dump in caring for current mine tailings and preventing creation of a nuisance.

“(i) Gradually the dump is approaching the maximum depth (or height) to which tailings can be retained by the existing dikes, which will involve two problems: (1) assuming continuation of mining operations by plaintiff, the acquisition of additional dump sites by purchase or condemnation or construction of other dikes upon the existing tailings; and (2) the ultimate capping of the present dump with rock and material similar to the dike at a presently estimated cost of \$5000.00 per acre in order to prevent surface blowing of the tailings by wind onto the property of others.

“6. Plaintiff's mills at Arthur and Magna are situated upon tracts comprising a total of 982.42 acres of land owned by plaintiff and more particularly described in the complaint and in the evidence before the court. These lands are assessed separately from any improvements or personal property thereon; they are not located upon patented mining claims or locations and are situated geographically against the base of a mountain sloping down to the north where the refuse in the form of tailings dump is deposited on part of the bottom lands of old Lake Bonneville. These lands are situated so that they are particularly adaptable to a gravity process of reducing ores, are easily accessible to the American Smelting & Refining Garfield smelter where the concentrates produced at the Company's mills may be further

reduced by smelting, and are easily accessible to the railroads where the smelted products may be received and shipped to the refineries for the final reduction process to a marketable product. Lands similar to the millsite lands and adjacent thereto can be used for grazing and other purposes since, as distinguished from the tailings dump area, the original characteristics of the millsite lands and their potential uses have not been destroyed.

“7(a). Prior to the year 1919 said lands were assessed by the county assessor of Salt Lake County. Commencing with that year and continuing to date said lands were assessed by the taxing authorities of the State of Utah, i.e., the State Board of Equalization for the years 1919 to 1930, inclusive, and since that time by the State Tax Commission under the provisions of 80-5-56, Utah Code Annotated, 1943, as amended. Said lands were assessed as real estate, and in addition there was assessed machinery and property of plaintiff and the surface use made of mining claims or mining property other than for mining purposes, and the assessed valuation based on net annual proceeds of the mine pursuant to Section 80-5-56 et seq.

“(b) The assessment of plaintiff's mine was protested for the years 1917 and 1918 and resulted in litigation which terminated with the decision of the United States Circuit Court of Appeals November 12, 1923, Salt Lake County v. Utah Copper Company, 294 Fed. 199.

“(c) The assessment in particular with respect to the tailings dump millsites and recreation area was protested in 1942 and each year thereafter, the protests for the years 1947 and 1948 resulting in the present case, and that for the year 1944 resulting in the case of Salt Lake County

v. Kennecott Copper Corporation, decided by the United States Circuit Court of Appeals April 14, 1947, 163 Fed. (2d) 484.

“(d) By stipulation in the course of trial the matter of the recreation area has been eliminated from this case, together with other issues accordingly not covered by these findings of fact.

“(e) The lands in question, namely, the tailings dump and millsites, have never been reported by plaintiff to the State Tax Commission as a ‘mine or mining claim’ or as patented mining ground. These lands have however, always been reported by plaintiff and its predecessors in interest as a ‘part of its mine’ to be assessed at the statutory rate of \$5.00 per acre, which requested assessment has always been denied by the Tax Commission.

“(f) The only instance which has come to the attention of the Commission wherein a dump is located on other than a mining claim, patented or unpatented, is the Kennecott Copper Dump as outlined on Exhibit A. All other dumps being located on a mining claim, patented or unpatented, have been assessed at \$5.00 per acre. Plaintiff’s Utah Copper Mine is by far the largest physically in Utah, but its mines and dumps differ in no respect except in relative size and the further fact that this dump is not located on a mining claim, patented or unpatented. This last factor is one of the criteria which the Commission claims is and should be considered in assessing these mining dumps either at \$5.00 per acre under Section 80-5-56, or at 40 per cent of its reasonable fair cash value.

“8(a). The values for which plaintiff’s tailings dump and millsites were assessed for 1947 and prior years, the location of these lands with respect to adjacent lands, and the amounts for

which said lands were assessed, are shown in Exhibit A herein and by reference made a part of these findings. Lands adjacent to and physically the same as the millsite lands were assessed at \$5.44 and \$6.86 per acre. Lands adjacent to the tailings dump and physically the same as the dump land prior to its conversion to and use as such dump were assessed at figures ranging from \$4.14 to \$20.27 per acre with the exception of one 632-acre tract of the Morton Salt Company assessed at \$66.16 per acre. This tract is used by owner for impounding thereon the salt brine removed from Great Salt Lake. The salt in the various stages of harvest in the owner's several salt ponds is separately assessed. The tract on which the salt plant is situated is assessed at \$10.67 per acre.

“(b) The rate of assessment per acre of the plaintiff's tailings dump and millsite lands applied for 1947 and 1948 has been the same since 1919, except for two reductions in value along in 1932 or 1933 at which time there were some general reductions made in real estate values. Several changes in total acreage have occurred during this period which have been reflected in changes accordingly in the total assessment. Since the protests of the plaintiff in 1942 and thereafter the Commission has given consideration to the assessment of the property herein involved and has determined that the said figure of \$45.73 is reasonable, fair and proper.

“9. The taxes which plaintiff paid under protest to defendant and for which recovery is herein sought are \$12,163.97 for 1947 on the tailings dump and \$1909.27 on the millsites, less \$1538.80 tendered by plaintiff for 1947 based upon a valuation of \$5.00 per acre; and \$13,169.00 for 1948 less the same sum.”

II. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

a. Section 11, Article XIII of the Utah Constitution provides that the State Tax Commission shall assess mines for purposes of taxation. Section 80-5-3 of the Utah Code Annotated 1943 accordingly provides that the State Tax Commission must assess “all *mines and mining claims*, and the value of metalliferous mines” based on a multiple of the annual net proceeds as provided in subsequent sections, together with “all machinery used in mining and all property or surface improvements upon or appurtenant to *mines and mining claims* and the value of any surface use made of nonmetalliferous mining claims or mining property for other than mining purposes; all tangible property not required by the Constitution or by law to be assessed by the state tax commission must be assessed by the county assessor of the several counties in which the same is situated. For the purposes of taxation all mills, reduction works and smelters used exclusively for the purpose of reducing or smelting the ores from a *mine or mining claim* by the owner thereof shall be deemed to be appurtenant to such *mine or mining claim* though the same is not upon such *mine or mining claim*.”

b. By Section 80-5-55 the State Tax Commission is required each year to prepare a mine assessment book in which is to be entered “the assessment of all mines in the state subject to assessment by it and in which book must be specified in separate columns and under appropriate heads:

“(1) Owner of mine.

“(2) Name and description and location of the mine.

“(3) County in which it is situated.

“(4) Net proceeds in dollars, if a metalliferous mine.

“(5) Number of tons of ore mined whether by the owner, lessee, contractor or otherwise.

“(6) Amount received for ore and metal if sold; if not sold the value thereof.

“(7) Value of mine.

“(8) Value of the machinery.

“(9) Value of supplies and other personal property.

“(10) Value of improvements.

“(11) Value of machinery, property and surface improvements having a value separate and independent of all such *mines or mining claims* assessed by the state tax commission, and the names of the owners of the same.”

c. Section 80-5-32 provides that the county assessor shall furnish to the State Tax Commission a complete list and description “of all machinery used in mining, and all property and surface improvements upon or appurtenant to mines and mining claims, which have a value separate and independent of all such *mines or mining claims*, owned by the owner of such *mines or mining claims*, situated in his county, and note thereon the value of such property.”

d. Section 80-5-46(5) requires the Tax Commission to prepare and maintain from year to year a complete record of "all machinery used in mining and all property or surface improvements upon or appurtenant to *mines or mining claims*;" while Section 80-5-59 requires every person engaged in mining to make and file with the State Tax Commission a statement "showing the gross annual proceeds from each *mine or mining claim* and the production thereof in fine ounces of gold and silver and other precious metals, and in pounds of lead, copper and other semiprecious and base metals, and the deductions provided for Section 80-5-57, together with a statement showing all the machinery used in mining and all property and surface improvements upon or appurtenant to each *mine or mining claim* owned or worked by such person during the year preceding, and the value of the same at 12 o'clock m. on the 1st day of January next preceding, * * *"

f. Section 80-5-56 provides that "all metalliferous *mines and mining claims*, both placer and rock in place, shall be assessed at \$5 per acre and in addition thereto at a value equal to two time the net annual proceeds thereof for the calendar year next preceding;" while by the following section it is provided that: "The words, 'net annual proceeds,' of a metalliferous *mine or mining claim* are defined to be the gross proceeds realized during the preceding calendar year from the sale or conversion into money or its equivalent of all ores from such *mine or mining claims* extracted by the owner or lessee, contractor or other person working upon or operating the property, including all dumps and tailings, during or previous

to the year for which the assessment is made, * * *”
less certain deductions only therein enumerated.

g. Section 80-5-1 as amended in 1947 by Chapter 102 of the Session Laws for that year provides that “all taxable property must be assessed at 40% of its reasonable, fair cash value. Land and the improvements thereon must be separately assessed;” while Section 80-3-1(5) provides “ ‘Value’ and ‘full cash value’ mean the amount at which the property would be taken in payment of a just debt due from a solvent debtor.”

h. Finally, Sections 2 and 24 of Article I of the Constitution of Utah and Section 1 of the Fourteenth Amendment to the Constitution of the United States guarantee equal protection and uniformity in the administration of laws; Section 7 of Article I of the Constitution of Utah and Section 1 of the Fourteenth Amendment to the Constitution of the United States prohibit the taking of plaintiff’s property without due process of law; and Section 2 of Article XIII of the Utah Constitution provides that all tangible property in the State of Utah shall be taxed in proportion to its value, while the following Section 3 of the same Article provides that the legislature “shall provide by law a uniform and equal rate of assessment and taxation on all tangible property in the State, according to its value in money, and shall prescribe by law such regulations as shall secure a just valuation for taxation of such property, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its tangible property * * *”.

III. STATEMENT OF POINTS

1.

The District Court erred in failing to hold that the assessment was void because made in an arbitrary and discriminatory manner contrary to mandates for uniformity and equal protection.

2.

The District Court erred in failing to hold that the assessment was void because it violated the mandate that the valuation of these lands should be based upon the "amount at which the property would be taken in payment of a just debt due from a solvent debtor."

3.

The District Court erred in holding that the lands in question, particularly the tailings dump lands, were not a part of plaintiff's mine to which the statutory flat rate of \$5.00 per acre should apply.

IV. ARGUMENT

1.

The District Court erred in failing to hold that the assessment was void because made in an arbitrary and discriminatory manner contrary to mandates for uniformity and equal protection.

The record is clear that Kennecott alone of all the hundreds of mines in Utah has been singled out for "special attention." (R. 50) True, as the court suggested, the result may be that the tax treatment of the Kennecott dump lands and millsite lands is correct and that the

Commission is only in error with respect to its treatment of all other mine owners. Nevertheless, until the Commission indicates a willingness to correct all such other assessments, the result is arbitrary and discriminatory and justifies action by the court to void such an assessment.

As was said by the United States Supreme Court in the famous case of *Yick Wo v. Hopkins*, 118 U.S. 356, 30 L ed. 220:

“Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.”

Such a result would require action just as Utah's Supreme Court has said should be taken where the “property of one person, or a class of persons, or a particular class of property, is intentionally assessed at a valuation greater in proportion to its real or cash value than is placed on the general mass of other taxable property * * *. Denial of such right results in inequality and a want of uniformity in the assessment and taxation.” *First National Bank of Nephi v. Christensen*, 39 Utah 568, 118 P. 778.

Here, as shown by Exhibit A, like property owned by others adjacent to the millsite lands is assessed at \$6.86 and \$5.44 per acre, and adjacent to the tailings pond at \$4.14, \$8.67, \$8.73, \$8.75, \$6.75, \$66.16, \$10.67, \$10.54, \$4.85, \$7.28, \$7.33, \$7.31 (four tracts), \$10.06,

\$6.60, \$5.19, \$8.75, \$10.91, \$18.88, \$7.50, \$10.92, \$11.31, \$13.08, \$13.06, and \$22.89 (R. 12).

But when the Tax Commission undertook to apply the same prescribed measure of valuation to the Kennecott lands, it brought forth the figure of \$45.73 per acre. No one knows the origin of this particular figure, *which is 40% of \$114.40 per acre*, but when Kennecott protested Commissioner Hammond testified that the Commission considered the protest and was of the opinion this assessment was fair. (R. 95)

These mine assessments were, it should be noted, made by the Commission as a rule on the basis of an "evaluation" by the witness Higgs. (R. 23) When plaintiff attempted to go beyond the "crystal ball" fiat of the Commission and to seek out the standards used by its evaluator in the case of Kennecott, Higgs said that he didn't know where the \$45.73 figure came from except that it was *not* his own personal evaluation of the property on the basis of its value. (R. 56) He testified that he had reported the Kennecott lands to the Commission as part of plaintiff's mine and considered the tailings pond and the mills as a unit in the entire mining operation (R. 57); but that the Commission had instructed him to continue the use of the \$45.73 figure (R. 55); although he knew of no other single instance among the hundreds of Utah mines which he had evaluated and with which he was familiar where such assessment was made at other than as part of the mine at the flat \$5.00 per acre figure (R. 59). In Kennecott's case he used the figures given him by the Commission—he didn't evaluate. (R. 53)

Further, this magic figure of unknown origin was used by the Commission in disregard of the statutory mandates which until 1948 required use of full cash value, when by action of the 1947 legislature a reduction was made to 40% thereof. (R. 56) Finally, Mr. James W. Collins, whose reputation is well known, testified that the market value of the dump land was nominal (R. 74) and of the millsite lands \$10.00 to \$20.00 per acre. (R. 77)

By its actions it seems plain that the defendant Commission told Kennecott that regardless of constitution, statute or protests, it must accept this arbitrary and discriminatory assessment; and its counsel has frankly argued below the Commission's contention that the courts are powerless to effect a remedy.

2.

The District Court erred in failing to hold that the assessment was void because it violated the mandate that the valuation of these lands should be based upon the "amount at which the property would be taken in payment of a just debt due from a solvent debtor."

It seems clear to plaintiff that the Commission has departed from the statutory standards in determining what is value for tax purposes. Section 80-3-1(5), in qualifying Section 80-5-1, clearly indicates that, as admitted by counsel for the Tax Commission, *market value* is the test. Again we repeat that the test is the "amount at which the property would be taken in payment of a just debt due from a solvent debtor."

It is not the asset value or book value, but the *market* value which might be more or less. *Continental National Bank of Salt Lake City v. Naylor*, 54 Utah 49, 63; 179 P. 67. There the taxing authorities attempted to go behind market value to determine the asset value of bank stock. It excludes such intangibles as good will. Section 80-3-1(1); *Utah-Idaho Sugar Co. v. Salt Lake County*, 64 Utah 491, 210 P. 106.

“Actual value has been defined as the value of property in the market in the ordinary course of trade. This standard of values prescribed by statute cannot be varied by public officers or by agreement of parties.” 51 Am. Jur. 649.

Plaintiff of course appreciates, as is further stated by all standard works, that:

“All of the various elements which enter into the value of property are to be considered by the assessors in making valuations for tax purposes, and all that can be required is that the assessors exercise an honest judgment, based upon the information they possess or are able to acquire. In valuing tangible property, elements to be considered include the advantages of the situation of the property, its earning capacity or productiveness, *the purpose or use to which it is put*, its actual earnings, and any other factors which may influence or enhance its actual value.” 51 Am. Jur. Taxation, Sec. 697, Valuation-Elements.

The opinion of Mr. Collins specifically included all of the foregoing elements, and reached the result that the tailings dump was of nominal value and the millsite lands of a maximum value of \$10.00 to \$20.00. (R. 74, 77)

We quote from Mr. Collins' testimony with respect to the dump lands (R. 75):

A. I would consider any value put on it as simply an arbitrary value; it has no basic value for the ground; if I have answered your question correctly.

Q. Now, if the value is to be measured by the use of the land to Kennecott itself, is it your opinion that the figure of \$45.73 has any relationship to that value?

A. I would think not because it is useless land. I would have no idea as to the value of the tailings. That isn't covered in your question.

Q. That's right.

A. I have no idea of the value of the tailings; only speak of the values of the land. The value of the land was destroyed when these tailings were put upon them.

Q. Measured by the value of the use to Kennecott, the figure might just as well have been \$450 per acre or \$4,500 per acre, is that correct?

A. It would be just some arbitrary value.

Q. Or \$10 per acre?

A. That's correct.

Q. Mr. Collins, in assessing values for tax purposes, it is perfectly proper, is it not, to include in the elements of value such items as location and use to which the land may be put, and possible income therefrom, and similar factors, is it not?

A. That's correct.

Q. And you have had those in mind in expressing

your opinions in questions I have asked you?

A. I have.

With respect to the millsite lands he testified (R. 76):

Q. Assuming these facts, have these mill-site lands, or any part thereof, any reasonable fair cash value in the sense that this land, or any part thereof, would be taken in payment of a just debt due from a solvent debtor, and, of course, assume their availability for sale or disposition.

A. They would have a nominal value.

Q. Would you care to express an opinion of the limits which such land lands might have with respect to value, as contra-distinguished from the tailings dump lands where you said there was no value, or a nominal value?

A. Say from ten to twenty dollars an acre.

Q. Can you conceive of other uses to which these, or similar lands, can be put, if they were disposed of and not used by Kennecott?

A. For partly grazing purposes, not farming because the contour of the land is not available for anything excepting that purpose, excepting the use it is now put to.

Q. Then, in your opinion, and using as—assuming as the basis of the assessment for tax purposes to be forty per cent of the reasonable fair cash value of these mill-site lands, in the sense that these lands, or any part thereof, would be taken in payment of a just debt due from a solvent debtor, would the ad valorem tax assessment at the rate of \$45.73 per acre be within the permissible

limits of the exercise of judgment by tax authorities?

A. I would consider them to be greatly excessive.

Q. Would you say that would be so to the extent of the assessment being arbitrary?

A. I would say it was an arbitrary assessment, yes, sir.

Q. Now, assuming that we use, as a basis of the value, the value of those lands to Kennecott itself for its existing and current purposes, can you express an opinion as to what that value might be?

A. I'm sure I could not.

Q. Might it just as well be \$475 per acre or \$4,075 per acre?

A. It could be; it would be some arbitrary figure.

Q. Measured by the nuisance value, I presume, of Kennecott finding some other lands, would it not?

A. That is correct.

Q. And the expense of acquiring those lands and moving all the mills?

A. That is correct.

Mr. Hammond of the Tax Commission does not dispute this result. His difference arises on the question of whether or not there may also be injected into the picture *the special value of these lands in Kennecott's specific operation* (R. 82); and this is the issue on which this point turns. It is admitted by all concerned that if this element *can* be injected into the picture, the lid is

off in that 40% of the amount at which the property would be taken in payment of a just debt due from a solvent debtor no longer applies. The upper limit is "astronomical," and the figure used depends entirely upon the "judgment" of the Commission. (R. 88) In turn the figure used could be modified at any time by whim, malice or any other factor within the conscious or unconscious minds of the Commissioners, and with no ready test to determine whether or not the result was reasonable or arbitrary.

As was said in the case of *Great Northern Railroad Co. v. Weeks*, 297 U. S. 135, 80 L. ed. 532:

The full and true value of the property is the amount that the owner would be entitled to receive as just compensation upon a taking of that property by the State or the United States in the exertion of the power of eminent domain. That value is the equivalent of the property, in money paid at the time of the taking. *Olson v. United States*, 292 U. S. 246, 254, 78 L. ed. 1236, 1243, 54 S. Ct. 704. The principles governing the ascertainment of value for the purposes of taxation, are the same as those that control in condemnation cases, confiscation cases and generally in controversies involving the ascertainment of just compensation. *West v. Chesapeake & P. Teleph. Co.* 295 U. S. 662, 79 L. ed. 1640, 1646, 55 S. Ct. 894.

Again, as was said in the case of *Lebanon & Nashville Turnpike Co. v. Creveling* (Tenn.), 17 S.W. (2d) 22:

A careful examination of the instructions given by the learned trial judge satisfied us that

he properly followed the well-established rule announced repeatedly in this state, in accord with text-book and decision authorities generally. See, among others, 20 C.J. 727, 728; 10 R.C.L. 128; Tennessee cases above cited; and authorities quoted in *Alloway v. Nashville*, 88 Tenn. 510, 8 L.R.A. 123, 13 S.W. 123. We quote from the charge the following excerpts:

“For the property actually taken he is entitled to a sum equal to its fair market value on the day of the appropriation. In determining such ‘fair market value’ you will assume that the owner of the property on the date of the appropriation was willing to sell, but did not have to do so, and that the taker desired to purchase that particular kind and quantity of property, but, like the owner, was under no particular constraint to make the trade and transfer. That is to say, you may assume that some reasonably prudent man wanted such property as was owned by the defendant and that in his survey of available purchases came upon the property in question and that the owner of such property, although he did not have to sell, was willing to do so for a fair price and full cash payment. Then what you believe the property would likely bring under such circumstances is the figure you are justified in putting down as your judgment of the property’s ‘fair market value.’”

“The value of the property taken cannot be enhanced by the owner’s unwillingness to sell, *nor is the question to be considered the peculiar value of the property to the owner* nor its value to the party condemning it. The desire of the defendant to keep and the need of the plaintiff to buy are not such considerations as should regulate your estimate of ‘fair market value.’”

Likewise the annotation in 124 A.L.R. 910 is replete with illustrations that special values for adaptability of property for the particular purpose taken, are *not* to be included in the measure of value, instances being those of property for reservoir and power plant sites, docks, highways, schools, telephone and telegraph and power line facilities, etc.

This is reflected in Utah law where in the case of *Tanner v. Canal and Irrigation Co.*, 40 Utah 108, our Supreme Court said:

Counsel, however, urge that to permit respondent to use their canals as contemplated will be of great advantage, and may result in considerable profit to him. This may be so, and yet the question remains, In what way does what he is permitted to do damage appellants? They are limited in their recovery by the amount of damages suffered by them. *They cannot recover for any benefit respondent may receive.* * * *

We fully recognize that the potential need for the acquisition of adjacent lands as additions to the tailings dump has increased greatly the value of those lands through this possible use, and this is reflected in the present valuations thereof. Where we differ is with the Commission's contention that because a lot is improved by the addition thereon of a \$100,000.00 building, the value of the land *as distinguished from the building* could be set for tax purposes at a point from its cost to a maximum figure of \$100,000.00 *because this is the value of the use of that land to the owner*. We can see that the improvement of the land by the addition thereto of a \$100,000.00 building may add to and enhance the

value of the land on which it stands, as well as to the value of adjacent lands. Or the building, if a tannery, may well detract generally from land values of both the tannery site and adjacent lands.

But the lands themselves do not directly partake of the values of the improvements. Such enhancement or diminution in land value resulting is reflected in market values, or as Utah's statutes read, in the value in money at which a creditor would accept the land in payment of a debt due from a solvent debtor. By departing from this standard the Tax Commission insists upon perpetuation of a wholly arbitrary, unreasonable and capricious assessment, contrary to law.

3.

The District Court erred in holding that the lands in question, particularly the tailings dump lands, were not a part of plaintiff's mine to which the statutory flat rate of \$5.00 per acre should apply.

True, not until 1942 did plaintiff, concerned with annual tax bills in the millions, protest to the Tax Commission that its relatively insignificant assessment of the tailings dump and millsite lands was unjust. While before the court below, the Commission finally confessed to two protested failures to follow the statutes, it still refused to admit either of the bases for complaint herein-before set forth; or Kennecott's third objection, which would settle the other two: the legislative mandate to the Commission is that metalliferous mines should be assessed as a unit, with the land at a flat \$5.00 per acre.

This of course is in addition to improvements and appurtenances such as buildings and equipment, with the net proceeds the essential ingredient for the ad valorem assessment.

In addition to the "crystal ball" theory that the Commission could evolve a "judgment" free from judicial or even legislative control, counsel for the Tax Commission evolved two further defenses to answer this third point, as well as the fact that it was giving Kennecott "special treatment" among all the hundreds of Utah mines with their mills and dumps in each case an essential integrated part of each mine.

The first defense was that Kennecott had failed to protest. This rapidly blew up, since for years Kennecott and its predecessors have reported the mills and dump lands as a part of its mine to which the statutory flat rate of \$5.00 per acre should apply. (R. 60, 108). Incidentally, this rate—let alone 100% thereof—is a liberal figure in the State's favor, for rarely if ever is mining land worth more for any purpose other than for mining.

The second theory was more difficult to discover. Counsel for plaintiff had tried in vain to determine what possible basis the Tax Commission had for its discrimination. Over constant objections at the time of trial it was found from Higgs that neither size (R. 27), contiguity of the dump or mills to the mine portal (R. 28), physical characteristics of the land (R. 29), type of metal extracted or method of extraction (R. 29), were criteria for the difference in treatment. Then Higgs (R. 29) came forth with this novel contention: Section 80-

5-56 providing for the flat \$5.00 per acre was intended to apply only to "mining claims," and Kennecott's dump and mills were not located on mining claims!

After a squabble that tried the patience of the court, (e.g., R. 37, 47) counsel for defendant finally admitted (R. 37-8):

MR. TAYLOR: The Court propounded the question.

THE COURT: He has been asking this question for five or six minutes here, and it seemed clear enough to me, but we haven't had any answer to it, so I merely used an example. I don't accuse anybody of refusing to make an answer, but I just gave what seemed to me a reasonable example. I think—let's not worry about whether it is material or immaterial at this time, and, meanwhile, we can discuss that, and, if it isn't controlling or material, we won't pay any attention to it and, if you feel, for any reason, you want to put on any evidence pertaining to it before a determination is made of this issue we agreed to try first, why we will hear everything you have to say about it.

MR. TAYLOR: Well, in answer to the question propounded, I will say this—and that we object to the question and the information that counsel desires, as being immaterial to the issues presented here today, and immaterial to any issue which is ultimately to be determined in this case, and I will say this, that counsel knows of no case in which a dump is located on other than a mining claim, wherein it is assessed at other than \$5 an acre; that, from information I have, all dumps which are located on mining claims—that is, the title is mining claim or is mining property—the property, the surface itself, is assessed

at \$5 per acre; that the only instance that—and we can establish this, if necessary, by testimony—the only instance which has come to the attention of the Commission where a dump of any is located on other than a mining claim or mining property is the Kennecott Copper dump outlined on Exhibit A, and that it is the position of the Commission that that is a criterion.

MR. BEHLE: That that is?

MR. TAYLOR: Yes.

MR. BEHLE: Or should be?

MR. TAYLOR: Is or should be.

The witness Mr. Higgs reluctantly continued: The manner of surface use of the land in connection with the mining operation is *not* a criterion used by the Commission for determining whether or not the \$5.00 flat rate should apply. (R. 49, 50) The Kennecott dump is the only one in Utah receiving “special attention.” (R. 50) That dump is no different from any other except it is bigger because of the large operation and low ratio of metal extraction. (R. 51). In Kennecott’s case alone the Commission directed him to use the \$45.73 figure. (R. 53, 55) He didn’t otherwise know where that mystic figure came from. (R. 56) He considered the tailings pond and mills as a unit in the entire Kennecott mining operation. (R. 57) He knew of no single instance where in practice the Commission has made an attempt to determine if a mine’s dump or mill was physically located on a mining claim, or on other ground. (R. 59) Finally, counsel stipulated that Kennecott’s dump and these mills were not located on “mining claims.” (R. 65)

It was established that the precipitates from the dump were included in the mine's net proceeds tax base. (R. 97) Also that in applying the \$5.00 flat rate to mining operations other than the dump, no segregation has ever been attempted on the basis of particular use or the type of patent or location, except that residential use by employees of a mine is treated on that additional basis for assessment purposes, in this case company-owned homes in Bingham or Copperton. (R. 42)

Finally, it should be noted that the decision of the court below adverse to plaintiff was made only when he had first been assured by all parties that this appeal would be taken, saying: "I prefer you wouldn't abide by this decision." (R. 115)

With this background in mind, did the lawmakers, using the words "mines and mining claims" constantly in the constitution and statutes, intend to so limit the flat rate assessment figure applicable to "metalliferous mines and mining claims" to limit dump and millsites, the former particularly inherently essential to and integrated with the mine, to situations when these dumps or mills happen to be located on mining claims in the technical legal sense as distinguished from desert entries or other types of derivative or original titles to the particular land?

At an early date the Utah Supreme Court in discussing these words "mines and mining claims" stated that the legislature did not mean just the excavation. In *Nephi Plaster & Mfg. Co. v. Juab County*, 33 Utah 114, 93 P. 53 (1907), the court quotes from Lindley on

Mines wherein is reviewed and discussed the authorities and meaning of mines and minerals and its development from an original restriction to subterranean excavations, to modern broader meanings. The court then says:

“Turning now to the decisions of this country, we find that the term ‘mines’ is not confined to subterranean excavations or workings, nor is the term ‘minerals’ confined to metalliferous ores.”

The \$5.00 flat assessment rate plus the multiple of net proceeds is the method adopted by Utah’s Constitution and statutes fairly to reflect and include for ad valorem tax purposes the special value of the mine in its broad sense, as distinguished from machinery, surface improvements, and property used for other than mining purposes which can be tested for value by normal standards. This intention is brought out by such cases as *Ontario Silver Mining Co. v. Utah County*, 80 Utah 491, 15 P. (2d) 633. The opinion in the *Ontario Silver Mining* case is so important to the current problems that we take the liberty to cite from it at length:

The tax in question was assessed and levied pursuant to article 13, section 4, of our Constitution, which reads as follows:

“All mines and mining claims, both placer and rock in place, containing or bearing gold, silver, copper, lead, coal or other valuable mineral deposits, after purchase thereof from the United States, shall be taxed at the price paid the United States therefor, unless the surface ground, or some part thereof, of such mine or claim, is used for other than mining purposes, and has a separate and independent value for

such other purposes; in which case said surface ground, or any part thereof, so used for other than mining purposes, * * * and all machinery used in mining, and all property and surface improvements upon or appurtenant to mines and mining claims, *which have a value separate and independent of such mines or mining claims*, and the net annual proceeds of all mines and mining claims, shall be taxed" by the state board of equalization. (Italics ours.)

The tax must therefore be sustained, if sustained at all, by the provisions of the section we have just quoted.

The Attorney General and his assistants, who appeared for defendant in this court, contend that the tax in question is legal, and that it is based on and sustained by that portion of the section which we have italicized and to which we refer without repeating it here. Counsel for the defendant further insist that the two tunnels in question are property, that they are appurtenant to plaintiff's mine and that they "have a value separate and independent" from its mine. While no case precisely in point has been found, yet both sides cite and apparently rely upon the case of *Hale v. County of Jefferson*, 39 Mont. 137, 101 Pac. 973, in which case a constitutional provision identically like ours was under consideration. In that case a ditch which was used to convey water to a placer mine and by means of which the placer mine was being worked was assessed for taxation, and the owner of the mine and the ditch brought an action to enjoin the imposition of the tax. It was stipulated in that case that the ditch there in question, which was a number of miles in length, was used for the sole purpose of conveying water to the placer mine, and that the same had never been used

for any other purpose, and the owner had never derived any benefits or revenue therefrom, except such benefits as he derived from the use of the water in working the placer mine. It was conceded, however, that the owner of the ditch could sell the water for beneficial uses for other purposes, and that for said purposes the ditch would be valuable. *The Supreme Court of Montana held that the ditch there in question did not constitute property having a value "Separate and independent" from the placer mine within the purview of the provision which we have italicized above.*

* * * *

We do not wish to be understood by what we have said that, merely because certain property is necessary to operate the mine, for that reason alone it may not be assessed as possessing a separate and independent value. *Whether any specific property may or may not be assessed as having a separate and independent value can be best determined when the facts are presented for decision.* It is sufficient now to hold that the tunnels in question are not assessable as having a separate and independent value under our Constitution.

We are of the opinion, therefore, that the two tunnels in question are not assessable for taxation. Any other conclusion would result in the taxation of any shaft, tunnel, or incline in any mine which the mine owner might permit another mine owner to use, in order to work the latter's mine. Moreover, we think, it was not contemplated by the constitutional provision aforesaid that any of the underground tunnels, drifts, or inclines of any mine which are used in connection with the mine, and which are necessary to successfully operate the mine, like the

tunnels in question, should be taxed as separate and independent property.

It will be noted that the assessment in the Ontario case was made by the old Board of Equalization about the same time that there was first assessed on plaintiff's tailings dump lands and millsite lands the special use to the particular operator for its particular operations. Perhaps here originated the \$45.73 figure.

The decision of the court in the Tintic Standard case in 1932 likewise reflects the legislative intention to include in the special system of mine taxation on the basis of a multiple of net proceeds, *all* values peculiar and special to the particular mine. We quote from page 509 of this decision; (104 Utah 505, 106 P. 2d 163):

* * * The machinery, plant, and buildings were, under the Constitution and law, required to be assessed independent of the mine or the net proceeds thereof, at full value for purposes of taxation, and it is presumed this was done and the tax paid thereon. * * * The shafts are comparable to the drain tunnel in Ontario Silver Mining Co. v. Hixon, 49 Utah 359, 164 P. 498, held to have no value separate and independent of the mine, and therefore not assessable as an improvement. A mine shaft is not in the same class of property as machinery and surface improvements which have a separate and independent value for taxation purposes.

Finally, we quote from Mr. Justice Wolfe's opinion (unanimous in this respect) in the 1940 case of Telonis v. Staley, 106 P. (2d) 163, 104 Utah 505, where at page 172 of the Pacific Reports he says:

I agree (1) that where mining property is involved, all the mining property to wit: mining claims, mineral deposits, workings, machinery used in connection therewith, and all buildings and surface improvements upon or appurtenant to the mines or mining claims whether on or off the claim, and all mills, smelters, refineries or reduction works used *exclusively* for the purpose of reducing or smelting ores from a mine or mining claim *by the owner thereof*, shall be assessed as real estate and as a whole, all parts being considered as a unit for purposes of assessment, levy, and sale.

In contrast to the above is the decision directly to the contrary by the United States Circuit Court of Appeals in 1947. To this we can only suggest that that court, concerned in other matters which were the important issues in the case, did not have before it the same record now before this court; and that its opinion concerning the problems now at hand was neither thorough, nor realistic, nor even responsive to the record before that court. We believe that this has been developed in the first two points of our argument in view of the practical difficulties which arise if the \$5.00 flat rate does not apply.

As to *res adjudicata*, we recognize that the tax assessment on the record and for the year 1944 before the United States Circuit Court is a dead duck.

But here is a new assessment, on the facts as they existed at the time this new assessment was made; and a new cause of action and a record quite different than that before the Federal Court. This is not merely a

relitigation before the same courts of an old cause of action; there is no basis in this record for either res judicata or estoppel. This is the first time this issue has been before this court, which is the ultimate tribunal in this respect.

Utah's Supreme Court has stated that it will reconsider its own decisions for another tax year if new points or questions are advanced. *Kennecott Copper Corporation v. State Tax Commission*, 212 P. (2d) 187. That case involved different tax years where federal subsidies were included in the ad valorem tax base of the complaining mines.

And this case differs in still another aspect. Utah's courts, having by federal recognition the preemptive power to interpret conclusively its own statutes, are here for the first time called upon in connection with the problems of this specific case. The contention of the defendant and intervenor would deny this preemptive right, as well as the right recognized by the same court to reconsider its own decisions when the prior result for any number of good reasons in equity and justice should permit of correction. As was well said in the *Sunnen* case, the doctrine of res adjudicata "rests upon considerations of economy, of judicial time and public policy favoring the establishment of certainty in legal relations." The rule is not intended as a cross on which to carry forever a litigant who has not had his day in the court which has the ultimate duty of construing Utah's statutes. (*Commissioner v. Sunnen*, 333 U. S. 591, 68 S. Ct. 115, 92 L. ed. 898.)

V. CONCLUSION

From the foregoing we respectfully conclude:

1. The intention of Utah's legislature and the basis of the constitutional plan for the assessment of mines (as distinguished from utilities and other operations referred to in the testimony of Mr. Hammond) contemplate, in the words of Mr. Justice Wolfe, *the assessment of the mine as a unit*. The mine is to include "all of the mining property, to wit: mining claims, mineral deposits, workings, machinery used in connection therewith, and all buildings and surface improvements upon or appurtenant to the mines or mining claims whether on or off the claim, and all mills, smelters, refineries or reduction works * * *." In assessing such unit "as real estate and as a whole," the surface should be assessed at \$5.00 per acre; machinery, buildings and surface improvements which have values apart from their use in the mine, are to be assessed according to their "value" as in the case of any other such property; and the remaining values pertaining to the mine operation all come under the multiple-of-net-proceeds factor, including proceeds from all dumps.

Such would be the simple, fair and reasonable solution in this case, avoiding the constant argument which has occurred over the years. Millsite and especially dump lands being so inherently and intimately connected with and an integral part of every mine, it just does not seem realistic that Utah's legislature, constitutional convention and electorate intended any separation such as

is urged by the Tax Commission.

As was said by the Federal Court in 1900 (In Re Rollins Gold & Silver Mining Co., 102 F. 985):

* * * Mining and milling would seem to be, taken together, one industry, having for its object "to obtain possession of material products in the state in which they were fashioned by nature." Mining, the process of extracting from the earth the rough ore, would seem to be the first step in the process, milling or reducing the second step, to wit: the further separating of the materials found together, the one from the other, and extracting from the mass the particular natural product desired.

To further suggest that the legislature and the people of this State in 1896 intended to draw the line on a technical distinction as to whether or not a particular mine's mill or dump, or any part thereof, was in one case upon a mining location, a milling location, a patented mining claim, a patented milling claim, or perhaps on a tunnel location or patented claim, or, in the other instance, was upon a desert entry, a townsite, a railroad grant or a land title based upon adverse possession or condemnation, seems just fantastic and unreal. That it is utterly impractical is shown by the complete disregard and non-use of any such "test" by Utah's taxing authorities in more than fifty years' administration of the mining tax laws.

2. However, if due to the unfortunate Circuit Court decision or for any good reason, such is determined *not* to be the legislative intent and requirement, then the

assessment is *still* void because arbitrary and discriminatory, and because the Commission has failed to follow the requisite legislative standard laid down by Sections 80-3-1, 80-5-1 and 80-5-56 as amended.

Measured by the legislative test of value, the dump lands' value is nominal and that of the millsite lands does not exceed \$20.00; and to these beginning in 1948 the 40% factor must be then applied as in the case of all other property.

3. If the Tax Commission has failed to follow legislative mandates under either of the alternatives above, we submit that this court has both the power and duty to grant the requested relief.

As was said in the case of *People v. St. Louis Bridge Co.*, 191 N.E. 303:

The fact that there may be a difference of opinion as to the value of property between the assessing authorities and the court does not justify interference on the part of the court. However, when the evidence shows that there has been a gross overvaluation, entirely out of proportion to the actual value of the property, so that it is obvious that the assessment was made by the taxing officers unfairly, deliberately, and willfully and in gross defiance of the rights of the property owner, the court will interpose in defense of the taxpayer. *Pacific Hotel Co. v. Lieb*, 83 Ill. 602; *People v. Wiggins Ferry Co.* supra. In a case of excessive overvaluation it is not necessary that intentional fraud be shown, but where the evidence clearly establishes that the assessment was made either in ignorance of the value of the property or not on a judgment

based upon readily obtainable facts, or the property was designedly excessively valued, such conduct on the part of the taxing authorities amounts to a constructive fraud. * * *

See also *Nephi Bank v. Christensen*, supra; *Salt Lake County v. Utah Copper Co.*, supra, certiorari denied 264 U. S. 590; *Fox v. Groesbeck*, 63 Utah 401, 226 P. 183; and 51 Am. Jur. 667, § 724.

These statutory provisions are clearly for the benefit of the taxpayer and the rule of strictissimi juris applies. *Tintic Undine Mining Co. v. Erckenbrack, et al.*, 93 Utah 561, 74 P. (2d) 1184, 51 Am. Jur. 617, § 651-2; and *Telonis v. Staley*, 104 Utah 537, 144 P. (2d) 513. Also the recent Idaho case of *Anderson's Store v. Kootenai County*, 215 P. (2d) 815.

It is respectfully submitted that there is no justification in support of the Tax Commission's persistence in assessing at a rate of \$114.40 per acre tracts of land which are part of plaintiff's mine and the market value of which ranges from a nominal value to a maximum of \$20.00.

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